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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

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THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN LEE LOSIEVSKI,

Defendant and Appellant.

C047277

(Super. Ct. No.  
NCR62983)

Defendant Steven Lee Losievski pled guilty to evading a police officer with wanton disregard for the safety of persons and property (Veh. Code, § 2800.2, subd. (a)) and admitted having served a prior state prison term (Pen. Code, § 667.5, subd. (b)). In exchange for his plea, other charges and special allegations were dismissed.<sup>1</sup>

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<sup>1</sup> The negotiated plea specifies that the “[district attorney] agrees to dismiss [the] remaining counts [and] special allegations.” Nothing in the record indicates the trial court

The trial court sentenced defendant to four years in prison (the upper term of three years for evading a police officer, plus one year for the prior prison term enhancement). In imposing the upper term, the trial court stated: "[T]he factors in aggravation outweigh those in mitigation. The [d]efendant was on parole. His prior parole performance has been unsatisfactory, and the [d]efendant has numerous prior convictions."

On appeal, defendant claims that imposition of the upper term violated the Sixth Amendment of the United States Constitution.

#### DISCUSSION

Applying the Sixth Amendment to the United States Constitution, the United States Supreme Court held in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [147 L.Ed.2d 435, 455] (hereafter *Apprendi*) that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely upon facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely v. Washington* (2004) 542 U.S. \_\_\_, \_\_\_ [159 L.Ed.2d 403, 413-414] (hereafter *Blakely*).)

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complied with this part of the plea agreement, but we presume it did so. (Evid. Code, § 664.)

Relying on *Apprendi* and *Blakely*, defendant claims the trial court erred in imposing the upper term for evading a police officer because the court relied upon facts not submitted to a jury and not proved beyond a reasonable doubt, thus depriving him of the constitutional right to a jury trial on facts legally essential to the sentence. Assuming, without deciding, that defendant did not forfeit his claim by failing to object at sentencing, his argument fails.

One of the reasons the trial court gave for imposing the upper term is defendant's prior criminal convictions. (Cal. Rules of Court, rule 4.421(b)(2).) As we have noted, the rule of *Apprendi* and *Blakely* does not apply to a prior conviction used to increase the penalty for a crime. A second reason the trial court gave for imposing the upper term is defendant was on parole when the crime was committed. (Cal. Rules of Court, rule 4.421(b)(4).) "Because this fact arises out of the fact of a prior conviction and is so essentially analogous to the fact of a prior conviction, . . . constitutional considerations do not require that matter to be tried to a jury and found beyond a reasonable doubt. As with a prior conviction, the fact of the defendant's status as a probationer arises out of a prior conviction in which a trier of fact found (or the defendant admitted) the defendant's guilt as to the prior offense. [Citations.] As with a prior conviction, a probationer's status can be established by a review of the court records relating to the prior offense. Further, like a prior conviction, the defendant's status as a probationer "does not [in any way] relate to the commission of the offense, but goes

to the punishment only . . . .” [Citation.]” (*People v. George* (2004) 122 Cal.App.4th 419, 426, italics omitted.) We discern no material difference between a defendant’s probation status and his parole status as a factor to support the choice of the upper term. Accordingly, we conclude that defendant had no right to a jury trial on whether he committed the current crime while on parole.

One valid factor in aggravation is sufficient to expose defendant to the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) Here, there were two valid factors that do not violate the rule of *Apprendi* and *Blakely*. Hence, there was no sentencing error.

#### DISPOSITION

The judgment is affirmed.

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SCOTLAND, P.J.

We concur:

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RAYE, J.

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MORRISON, J.